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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,)	06-CV-0928 SC
)	
Plaintiff,)	STIPULATED SETTLEMENT
)	AGREEMENT AND
vs.)	[PROPOSED] ORDER
)	
DIRK KEMPTHORNE, et al., ^{1/})	
)	
Defendants.)	
)	

^{1/} Pursuant to Federal Rule of Civil Procedure 25(d), Dirk Kempthorne, Secretary of the Department of the Interior is substituted for P. Lynn Scarlett, the previous Acting Secretary.

Stipulated Settlement Agreement and [Proposed] Order
06-0928 SC

1 Plaintiff, Center for Biological Diversity (“Center”) and Defendants, P. Lynn Scarlett, Acting
2 Secretary of the Interior (“Secretary”), and the U.S. Fish and Wildlife Service by and through their
3 undersigned counsel, state as follows:

4 WHEREAS, on April 8, 2004, the Fish and Wildlife Service (“Service”) received a petition
5 to list the Tricolored Blackbird as an endangered species, to designate critical habitat for the species,
6 and to provide listing on an emergency basis pursuant to the Endangered Species Act, 16 U.S.C. §
7 1531 *et seq.* (“ESA”);

8 WHEREAS, on February 13, 2006, the Center filed a complaint for declaratory and
9 injunctive relief, challenging the Secretary’s failure to issue a ninety-day finding in response to the
10 petition as required by 16 U.S.C. § 1533(b)(3)(A);

11 WHEREAS, the parties, through their authorized representatives, and without any admission
12 or final adjudication of the issues of fact or law with respect to the Center’s claims, have reached
13 a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes
14 set forth in Center’s complaint;

15 WHEREAS, the parties agree that settlement of this action in this manner is in the public
16 interest and is an appropriate way to resolve the dispute between them;

17 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
18 FOLLOWS:

19 1. On or before December 6, 2006, the Service shall submit to the *Federal Register* a finding
20 as to whether the April 2004 petition presents substantial information indicating that listing the
21 Tricolored Blackbird may be warranted pursuant to 16 U.S.C. § 1533(b)(3)(A). If the Service finds
22 that the petition has presented substantial scientific or commercial information indicating that the
23 petitioned action may be warranted, the Service shall submit a twelve-month finding pursuant to 16
24 U.S.C. § 1533(b)(3)(B) to the *Federal Register* by October 18, 2007.

25 2. Either party may seek to modify the deadline for any actions specified in Paragraph 1 for
26 good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the
27 event that either party believes that the other party has failed to comply with any term or condition
28

1 of this Agreement, the parties shall use the dispute resolution procedures specified in Paragraph 3.

2 3. The Order entering this Settlement Agreement (“Agreement”) may be modified by the
3 Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written
4 stipulation between the parties filed with and approved by the Court, or upon written motion filed
5 by one of the parties and granted by the Court. In the event that either party seeks to modify the
6 terms of this Agreement, including the deadline for the actions specified in Paragraph 1, or in the
7 event of a dispute arising out of or relating to this Agreement, or in the event that either party
8 believes that the other party has failed to comply with any term or condition of this Agreement, the
9 party seeking the modification, raising the dispute or seeking enforcement, shall provide the other
10 party with written notice of the claim. The parties agree that they will meet and confer (in-person
11 not required) at the earliest possible time in a good-faith effort to resolve the claim before bringing
12 any matter to the Court. If the parties are unable to resolve the claim within thirty days after the
13 notice, either party may bring the claim to the Court.

14 4. No party shall use this Agreement or the terms herein as evidence of what does or does
15 not constitute a reasonable time line for issuing a ninety-day or twelve-month finding under 16
16 U.S.C. § 1533 in any other proceeding regarding the Service’s implementation of the ESA.

17 5. Defendants agree that Plaintiff is the “prevailing party” in this action, and agree to pay
18 Plaintiff reasonable attorneys’ fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. §
19 1540 (g). Therefore, Defendants agree to settle all of Plaintiff’s claims for costs and attorneys’ fees
20 in the above-captioned litigation for a total of \$ 6000. A check will be made payable in that amount
21 to Plaintiff’s undersigned counsel, Brent Plater, Center for Biological Diversity, 1095 Market St.,
22 Suite 511, San Francisco, CA 94103.

23 6. Defendants agree to submit all necessary paperwork for the processing of the attorneys’
24 fee award to the Department of the Treasury’s Judgment Fund Office, pursuant to 16 U.S.C. §
25 1540(g)(4), within ten (10) business days of receipt of the court order approving this stipulation.

26 7. Plaintiff agrees to accept payment of \$ 6000 in full satisfaction of any and all claims for
27 attorneys’ fees and costs of litigation to which Plaintiff is entitled in the above-captioned litigation,
28

1 through and including the date of this agreement.

2 8. Plaintiff agrees that receipt of this payment from Defendants shall operate as a release of
3 Plaintiff's claims for attorneys' fees and costs in this matter, through and including the date of this
4 agreement.

5 9. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred
6 subsequent to this agreement arising from a need to enforce or defend against efforts to modify the
7 underlying schedule outlined in Paragraph 1, or for any other unforeseen continuation of this action.

8 10. By this agreement, Defendants do not waive any right to contest fees claimed by Plaintiff
9 or Plaintiff's counsel, including the hourly rate, in any future litigation, or continuation of the
10 present action. Further, this stipulation as to attorneys' fees and costs has no precedential value and
11 shall not be used as evidence in any other attorneys' fees litigation.

12 11. Subject to the qualifications in Paragraph 12, no provision of this Agreement shall be
13 interpreted as, or constitute, a commitment or requirement that Defendants take action in
14 contravention of the Endangered Species Act, the Administrative Procedure Act, or any other law
15 or regulation, either substantive or procedural. Nothing in this Settlement Agreement shall be
16 construed to limit or modify the discretion accorded to the Service by the ESA, the APA, or general
17 principles of administrative law with respect to the procedures to be followed in making any
18 determination required herein, or as to the substance of any final determination.

19 12. No provision of this Agreement shall be interpreted as, or constitute, a commitment or
20 requirement that Defendant is obligated to spend funds in violation of the Anti-Deficiency Act, 31
21 U.S.C. § 1341. In response, Plaintiff asserts that this Agreement does not create a conflict with the
22 Anti-Deficiency Act because the duty to make petition findings is required in non-discretionary
23 terms by the ESA and because the Anti-Deficiency Act would not excuse compliance with a pre-
24 existing court-approved Agreement. Plaintiff intends to assert this position if the Service fails to
25 comply with the terms of this Agreement for reasons of insufficient appropriations. Defendants
26 reserve all legal and equitable defense to any argument by Plaintiff that the Anti-Deficiency Act
27 does not apply to non-discretionary duties required by the ESA.

1 13. The parties agree that this Settlement Agreement (“Agreement”) was negotiated in good
2 faith and it constitutes a settlement of claims that were vigorously contested, denied, and disputed
3 by the parties. By entering into this Agreement the parties do not waive any claim or defense.

4 14. The undersigned representatives of each party certify that they are fully authorized by
5 the party or parties they represent to agree to the Court’s entry of the terms and conditions of this
6 Agreement and do hereby agree to the terms herein.

7 15. The terms of this Agreement shall become effective upon entry of an order by the Court
8 ratifying the Agreement.

9 16. Upon approval of this Agreement by the Court, all counts of Plaintiff’s Complaint shall
10 be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).

11 17. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully
12 request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and
13 to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511
14 U.S. 375 (1994).

1 Dated: June 8, 2006

2 Respectfully submitted,

3 /s/ Brent Plater (by RJR)
4 BRENT PLATER
5 Center for Biological Diversity

6 KEVIN V. RYAN
7 United States Attorney
8 JAMES A. CODA
9 Assistant United States Attorney

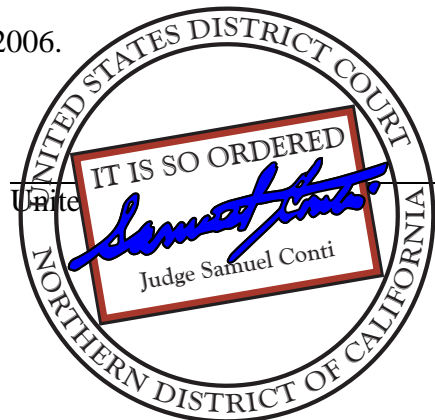
10 SUE ELLEN WOOLDRIDGE
11 Assistant Attorney General
12 JEAN E. WILLIAMS, Section Chief
13 LISA L. RUSSELL, Assistant Section Chief

14 /s/ Rebecca J. Riley
15 REBECCA J. RILEY, Trial Attorney
16 U.S. Department of Justice
17 Wildlife & Marine Resources Section
18 Environment & Natural Resources Division
19 U.S. Department of Justice

20 **PROPOSED ORDER**

21 The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as
22 an enforceable ORDER of this Court, and this matter is hereby DISMISSED with prejudice.

23 Dated: this 12 day of June 2006.



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NORTHERN DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,)	06-CV-0928 SC
)	
Plaintiff,)	CERTIFICATE OF SERVICE
vs.)	
)	
DIRK KEMPTHORNE, et al.,)	
)	
Defendants.)	

I certify that on this 8th day of June, 2006, a copy of the Stipulated Settlement Agreement and [Proposed] Order was sent automatically by the CM/ECF system to the following attorneys of record:

Brent Plater
bplater@biologicaldiversity.org
Justin Augustine
jaugustine@biologicaldiversity.org

/s/ Rebecca J. Riley
REBECCA J. RILEY